90-1193

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

PAUL DEE HUMAN, Superintendent of Gravette Public School District; A.P. VOHS, Principal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL MEADE, Members of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT, Petitioners,

v.

JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Counsel of Record
John Eidsmoe
Jones School of Law
Faulkner University
5345 Atlanta Highway
Montgomery, Alabama 36193-4601
(205) 272-5820 Ext 152

QUESTIONS PRESENTED

1. Whether a nonsponsored, nonfunded, nondenominational course of Bible instruction conducted on public school premises by outside persons and available to students on a voluntary basis with written parental permission, violates the Establishment Clause of the First Amendment to the United States Constitution.

2. Whether an Injunction prohibiting the School Board from permitting the above course of Bible instruction or any similar course of instruction on school premises during school hours is overly broad, overly vague, and/or violative of the free speech and free exercise of religion rights of Petitioners and the students, parents, and citizens they represent.

3. Whether genuine issues of material fact exist that render summary judgment inappropriate.

LIST OF PARTIES

The parties are as follows:

The Petitioners are the Defendants in the District Court action and the Appellants in the United States Court of Appeals for the Eighth Circuit action, PAUL DEE HUMAN, Superintended of Gravette Public School District; A.P. VOHS, Principal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JEERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL Meade, MNembers of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT.

The Respondents before this Court are the Plaintiffs in the District Court and Appellees in the Circuit Court, JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1990

PAUL DEE HUMAN, Superintendent of Gravette Public School District; A.P. VOHS, Principal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL MEADE, Members of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT, Petitioners,

v.

JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE, and all others similarly situated, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Superintendent Paul Dee Human and the Gravette, Arkansas, School Board, et. al., respectfully pray that a writ of certiorari issue to review the judgment, opinion and orders of the United States Court of Appeals for the Eighth Circuit dated October 23, 1990, affirming the Order and Opinion of the U.S. District Court for the Western District of Arkansas November 2, 1989.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Eighth Circuit dated October 23, 1990, is unreported; the Case Number is 89-2945. The Opinion and Order of the United States District Court for the Western District of Arkansas dated November 3, 1990, is reported at 725 F. Supp. 1503; the Case Number is 89-5088.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 Sec. (1).

The Order of the United States Court of Appeals for the Eighth Circuit was entered on October 23, 1990. This Petition has been filed within ninety days of the entry of judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

This case raises issues under the

Establishment Clause, Free Exercise Clause, and Free Speech Clause of the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The case also raises issues under the Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

> Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Procedural Posture

This case arises from the appeal of a permanent order issued against Petitioners prohibiting Petitioners, public school officals and board members, from allowing a nonsponsored, nonfunded, voluntary course of Bible instruction to take place on public school premises during regular school hours.

On July 12, 1989, Plaintiffs/ Respondents John Doe, Mary Doe, and Chris Doe filed a Complaint in the United States District Court for the Western District of Arkansas, Fayetteville Division, alleging that said course of Bible instruction violated their rights under the Establishment Clause and Free Exercise Clause of the First Amendment, and seeking an injunction prohibiting said course of Bible instruction from taking place on

school premises. On August 3, 1989, the District Court issued an Temporary Order prohibiting Defendants/Petitioners from permitting this course of Bible instruction or any similar course on school premises during regular school hours.

On August 10, 1989, Plaintiffs/ Respondents (Respondents) moved for partial summary judgment. On November 3, 1989, the District Court granted Respondents' Motion for Partial Summary Judgment and made the Temporary Order into a Permanent Order. Considering the three-prong test used by the Supreme Court for establishment clause cases as set forth in Lemon v. Kurtzman, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971), the District Court ruled that a substantial issue of material fact existed as to whether the course of Bible instruction had a secular purpose, but that the course clearly has the primary effect

of advancing religion and probably constitutes excessive entanglement of government with religion.

On November 30, 1989, Defendants/ Petitioners (Petitioners) appealed the Orders of August 3, 1989, and November 3, 1989, to the United States Court of Appeals for the Eighth Circuit. On October 23, 1990, the United States Court of Appeals for the Eighth Circuit affirmed the ruling of the District Court.

On January 18, 1990, Petitioners filed a Motion for Declaratory Judgment, asking the District Court to rule that the course of Bible instruction, as modified in several respects, did not violate the First Amendment to the United States Constitution. On February 14, 1990, the District Court denied Petitioners' Motion.

B. Statement of Facts

Gravette is a community of about 1,400 people, located in Benton County in the northwest corner of Arkansas. The Gravette School District includes the Town of Gravette and several nearby communities, as well as rural area. Gravette Elementary School has 532 students; about seventy percent (70%) ride the bus to school.

For at least fifty-one years, a weekly course of Bible instruction called Storytime has taken place in the Gravette Elementary School. The Storytime program consists of Bible story lessons of about half an hour in length, taught by ladies from the community. The ladies who teach the Storytime lessons are not state-certified teachers, are not hired by the school district, and receive no compensation for their teaching. The content of the teaching consists of

explaining to the children what the Bible says, and every effort is made to avoid teaching the doctrines of any particular denomination. The curriculum used is published by a nondenominational publishing house and spans the course of three years, two years being devoted to the Old Testament and one year to the New Testament. The two ladies who have conducted the Storytime sessions for the past several years, Elsie Smith and Barbara Stapleton, do not attend the same church.

The Gravette School Board has permitted Storytime to take place as a nonsponsored activity on a voluntary basis. Children are not allowed to attend Storytime unless their parents give written permission; however, about ninety-six percent (96%) of the parents do give written permission. Those whose parents do not give written permission for them to

attend Storytime are given other worthwhile things to do while Storytime takes place.

When it is time for Storytime, regular classes are released and those whose parents wish them to attend Storytime leave their regular classrooms and go to the classroom where Storytime takes place, while those who do not attend Storytime go elsewhere. These times are at regular class intervals while students generally are going to and from classrooms, so those who do not attend Storytime are not forced to leave the classroom while the others remain or remain in the classroom while the others leave.

Petitioners offered the following evidence by affidavit:

(1) Dr. Arnold Burron, Ph.D. Professor of Education at the University of Northern Colorado (a position he has held for twenty years), will testify that there

are hundreds of idioms in the English language and in common American usage that cannot be understood without a knowledge of the Bible. Among these are "he sold his birthrite for a mess of pottage," "city upon a hill," "salt of the earth," a "Judas Iscariot" for traitor, "It's David versus Goliath in tonight's football game," and hundreds of others. He will further testify that the Bible serves a secular purpose in educational development since it contains information that is valuable and foundational in many subjects such as law, government, history, literature, music, art, and others. He will further testify that a non-sponsored voluntary Bible study such as that which has taken place in Gravette, Arkansas, is not likely to involve undue peer pressure or stigmatization for those who do not participate. He will further testify that

that while the distinction between the school granting access to a Bible study and state sponsorship of the Bible study could probably be explained so that elementary school children could understand it, such explanation is unnecessary because elementary school-age children generally do not have a clear concept of what the state is, and thus the question of state sponsorship generally does not occur to them.

(2) Dr. Raymond Moore, Ph.D. in Educational Psychology, a former principal, superintendent, dean of a college of education, college president, and graduate programs officer for the U.S. Office of Education, will testify that the Bible plays a vital and foundational role in the development of children's values and morals, and that Bible study can be presented to children in a public

elementary school without peer pressure, without stigmatization, and without the appearance of state sponsorship, if it is handled properly.

(3) Dr. Dale R. Doty, Ph.D. in Family & Child Studies and Family Therapy from Oklahoma State University, will testify that the Bible can play an important role in children's character development and contains much that is helpful in training children to be good family members and, eventually, good parents.

(4) Dr. William B. Berman, Ph.D. in Educational Psychology from Indiana University, has been a public school psychologist and a supervisor of school psychology practicum, supervising graduate students in all areas of school psychological services. He will testify that teaching the Bible in public schools services a secular purpose, that of

fostering good character and moral values, and that of enhancing good order and discipline in the classroom.

(5) Dr. Glenn Carnagey, Ph.D. in American and English Literature, will testify that an understanding of the Bible is essential to an understanding of Western literature, particularly English and American literature, and also essential to an understanding of world history.

(6) Dr. W.R. Coulson, Ph.D. in Counseling Psychology and former research assistant to Drs. Carl R. Rogers and Abraham H. Mazlow, will testify that children need a sense of moral absolutes or moral commandments in the process of forming values, because children who are deprived of these moral absolutes lose all sense of moral development. He will testify that the Bible is a good sourcebook for such moral absolutes and moral

commandments, and that while it might be possible to use another source, it is most sensible and practical to use a source that is generally accepted by the community and reflects the moral values of the community. He will further testify that children of elementary school age are capable of distinguishing between school sponsorship and mere access to school facilities, especially if this distinction is carefully explained to them. He will further testify that much of public education follows the philosophy of John Dewey which calls for the systematic denial of the supernatural and seeks to bring the non-supernatural view into control of the machinery of education, and that courses of Bible instruction can be a balanced means of dealing with this problem.

(7) Dr. Paul Vitz, Professor of Psychology at New York University, will

testify that he conducted a federally-funded study of public school textbooks and concluded that the textbooks commonly used in the public schools of the United States do not give adequate, balanced, or objective treatment to the Bible, to Christianity, and particularly to Protestantism, and that textbooks do not give adequate or balance treatment to the role religion plays in the lives of the American people today. Because of this, the textbooks commonly used in the public schools of the United States are seriously deficient in the academic and moral development of children.

At the July 31, 1989, hearing on the Motion for Preliminary Injunction, Gayla Hendren, then a third-year law student at the University of Arkansas at Fayetteville, and now a Gravette attorney, testified that she was raised in Gravette, attended the

Gravette Elementary School, and participated in the Storytime program. She testified further that she was never pressured by the Storytime teachers to accept or believe any idea or doctrine, and that the Storytime program was enjoyable and helpful in her character development. She testified further that as an undergraduate music major she was better able to understand some of the great works of classical music because of her Bible training, and further that her Bible training helped her to cope with various ethical dilemmas during her law school training.

No evidence was presented indicating that the Storytime program had any effect of making students become more "religious" or converting them to any particular religion. Nor was any evidence presented indicating that any of those who

established the Storytime program, permit Storytime program to operate to day, or conduct the Storytime program, did so or do so with a primary religious purpose.

The ladies who currently teach Storytime testified that they make every effort to avoid denominational controversies and instead simply teach what the Bible says. They acknowledged that occasionally statements are made like "Jesus is the Son of God" or that the world was created in six days, but it is not clear from the record whether such statements were made as statements of objective fact, subjective opinions of the teacher, or simply saying that this is what the Bible says. The record is also unclear as to how frequently such statements were made, and no evidence was presented as to what if any effect such statements may have had upon the students.

REASONS FOR GRANTING THE WRIT

This case is unique, yet its application is universal. No case involving a course of Bible instruction of this nature has ever come before the United States Supreme Court, but the troubling question of whether or how to teach the Bible in our diverse society, faces every public school in the nation.

This Court has recognized that the Bible definitely has a place in public education. Even while striking down the reading of ten verses of the Bible daily as an official classroom exercise of worship, the Court emphasized that they did not mean to exclude the Bible from public education. Justice Clark, speaking for the majority in Abington Township v. Schempp, 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963), wrote:

> ...it might well be said that one's education is not complete without a

> study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Nevertheless, the precise role of the Bible in the public school classroom is difficult to assess because of constitutional constraints. Several of the leading religions, including Judaism and Christianity, are based upon the Bible.

Fearing entanglement of religion with the state, some educators have tried to avoid the problem by not mentioning the Bible at all in public schools. But by doing so they leave a large gap in their students' knowledge, and they deprive their students of a rich resource.

To a large extent, education is the

passing on of culture from one generation to the next. Every culture is ultimately based upon values, and values in turn have their roots in religion.

In the United States today, the state (meaning government, federal, state and local) carries the primary responsibility for promoting and passing on culture. It does so through its public schools, universities, endowments, and other means. If the state is the nation's chief educator, and if education involves culture, and if culture involves values, and if values are based upon religion, then inevitably, government must be involved with religion. For this reason the absolute separationist model of church-state relations, advocated by some but never adopted by this Court, is utterly unworkable. It was probably unworkable when this nation was founded. It is even

more unworkable today. In an age such as ours in which government at all levels is so intimately involved with the lives of the American people, it is impossible to totally separate government from religion. Attempts to do so are likely lead to the establishment of a semi-official "religion of secularism" in the sense of "affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe,'" which, as the Supreme Court noted in Abington v. Schempp, supra, the State may not do.

The Gravette case provides this Court with an excellent and unprecedented opportunity to review and reassess the Establishment Clause of the First Amendment, both as intended by the Framers of the Bill of Rights and as applied to our public schools today. For the people have

Gravette have chosen a unique and promising way of coping with the thorny question of whether and how to teach the Bible in public schools. Rather than ignore the Bible and deprive the children of an important educational resource as some have done, and rather than water it down through official courses in "Bible as literature" or "comparative religion" as others have done, the people of Gravette have chosen to separate Bible study from the regular curriculum and instead allow it to be taught by non-school persons as a non-sponsored, non-funded, voluntary activity. We suggest that this freedom from school sponsorship gives those who participate in Storytime greater freedom to conduct the program as they see fit, than they would have if Storytime were an official part of the curriculum.

We do not necessarily suggest that the

Court needs to abandon the three-prong test of Lemon v. Kurtzman, supra., for evaluating establishment clause cases, in order to uphold the Storytime program as constitutional. Rather, we believe the Storytime program can pass the "Lemon" test with flying colors:

(1) Storytime clearly has a secular purpose: developing character, training in moral values, and helping students understand a Book that has exerted an enormous influence on Western literature, art, music, law, philsophy, government, history, and life in general. The District Court in its November 3, 1989 Opinion acknowledged that a genuine issue of material fact exists as to the existence of a secular purpose.

(2) The primary effect of the Storytime program is to achieve the secular purposes stated above. Not a shred of

evidence exists to establish that the program has had any effect of advancing or inhibiting religion, let alone a primary effect. If such a primary effect exists, Respondents should bear the burden of proving this primary effect.

(3) There is no excessive entanglement. The school's role is limited to providing the room, distributing and collecting permission slips from parents once a year, and releasing the children to go to Storytime. The school does not select the curriculum, choose the teachers, dictate the teaching methods, monitor the classes, fund the program in any way, or either encourage or discourge attendance. It is hard to imagine how any activity could be less "entangled" than that.

Nor do we suggest that the Court needs to abandon its holdings in McCollum v. Board of Education, 333 U.S. 203, 92 L.Ed.

649, 68 S.Ct. 461 (1948), or Zorach v. Clausen, 343 U.S. 306, 96 L.Ed. 954, 72 S.Ct. 679 (1952). In McCollum the Court struck down an Illinois practice of allowing children to be released from their classes to attend religious instruction offered by pastors, priests and rabbis in assigned classrooms in the public schools, whereas in Zorach the Court upheld a New York program whereby children were released from classes to attend religious instruction off-campus in the children's respective churches.

At first glance the Gravette program might seem more like McCollum, since the program takes place on campus; but we believe substantial differences exist.

(1) In McCollum the religious studies were conducted by various denominations, while in Gravette there is one nondenominational study. The reason no

other program exists is that no one has ever asked to have one; the Board has stated that if any such request were received, it would be handled on an equal access basis.

(2) In McCollum the released time classes were sponsored by specific churches and synagogues and taught by ordained ministers, priests and rabbis, whereas in Gravette the Storytime program is not sponsored by any church and is taught by two laypersons who do not even attend the same church.

(3) In McCollum the complainants alleged that subtle pressures were exerted to compel attendance; in Gravette no such pressures are proven or even suggested, and the way the program is structured eliminates or minimizes that possibility.

(4) Most importantly, in McCollum the classes dealt with specific denominational

church doctrines; in Gravette the study is nondenominational and the teachers simply present the content of the Bible and make every effort to avoid denominational doctrines. This is highly significant because it means (a) the secular purpose of the program is greater, (b) there is less effect of advancing religion, and (c) there is less entanglement of government with religion.

For this reason, the Gravette case gives the Court an opportunity to consider the meaning of the term "religion" as used in the First Amendment. The term can have several connotations. On the one hand, the term can refer to a specific denomination or specific set of doctrinal beliefs unique to a denomination. On the other hand, the term can be used for a value system or set of moral principles that have their roots in religious beliefs. For example, there

are certain morals, values, or ethical principles that are found in the Bible and that are adhered to by, among others, Christians and Jews. Petitioners respectfully suggest that schools, as state agencies, have or should have more freedom to interact with "religion" in this second sense than in the first sense, and that this interpretation is consistent with the First Amendment as intended by its Framers and as it should be applied today. We believe this is consistent with the concept of accommodating religion as set forth by this Court in McGowan v. Maryland, 336 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961), and being "solicitous" of religion as suggested by this Court in Employment Division v. Smith, 494 U.S. ___, 108 L.Ed. 2d 876, 110 S.Ct. ____ (1990).

We note, finally, that Petitioners have never had the opportunity to litigate

thes momentous issues in a full trial on the merits. Rather, the District Court decided the matter against Petitioners by means of summary judgment.

Summary judgment is clearly inappropriate where, as here, there are genuine issues of material fact. Many such issues of material fact exist, such as whether the Storytime program has a secular purpose, whether the Storytime program has the primary effect of advancing religion, whether the Storytime program involves excessive entanglement of government with religion, whether the content of the Storytime program is primarily secular or religious, whether the Storytime teachers express religious convictions, and if so, how often, to what extent, and with what effect upon the students.

CONCLUSION

We therefore respectfully request that the United States Supreme Court either reverse the decision of the United States Court of Appeals for the Eighth Circuit and rule that the Storytime program as practiced in Gravette, Arkansas, is constitutional, or remand the case to the United States District Court for the Western District of Arkansas for a full trial on the merits.

Respectfully submitted,

John Eidsmoe
Counsel of Record
Jones School of Law
5345 Atlanta Highway
Montgomery, AL 36193-4601
(205) 272-5820 Ext 152

APPENDIX

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE, and all others similarly situated — PLAINTIFFS

v. Civil No. 89-5088

PAUL DEE HUMAN, Superintendent of Gravette Public School District; A.P. VOHS, Prilncipal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL MEADE, Members of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT — DEFENDANTS

ORDER

This matter having come on for hearing on the Plaintiff's Motion for a Preliminary Injunction, and the court being informed in the premises, the court finds:

1. That the Plaintiffs have demonstrated the existence of a substantial question upon which

they are likely to prevail upon final hearing, that question being whether the Gravette Public School District and the individual Defendants, by encouraging or permitting Bible instruction on the premises of the Gravette Elementary School during scheduled attendance hours, has established a religion in violation of the United States Constitution.

2. That the alleged constitutional violation exposes the Plaintiffs to immediate and irreparable harm.

3. That the balance of harms between the parties favors the Plaintiffs.

4. That the general public interest favors granting the injunction.

THEREFORE, IT IS ORDERED, that the Defendants, and each of them, be immediately enjoined, pending further

proceedings herein, from permitting on school premises within scheduled school hours, the existing course of Bible instruction or any other instruction that is predominantly religious in its purpose or effect; and from sponsoring by the authority of the Gravette Public School District any similar course ofinstruction that has a predominantly religious purpose or effect. This injunction is to be effective immediately and until further order of the Court.

It is so ordered.

-s-

HON. MORRIS S. ARNOLD
UNITED STATES DISTRICT JUDGE

Filed August 3, 1989

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
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ORDER

NOW on this 2 day of November, 1989, comes on for consideration plaintiffs' Motion for Partial Summary Judgment, filed on August 14, 1989, inthe above-styled cause. Defendants filed a response on September 8, 1989, and both sides have filed reply briefs.

For the reasons stated in the accompanying Memorandum Opinion, it is ORDERED that plaintiffs' motion be, and it is hereby, granted.

-s-

HON. MORRIS S. ARNOLD
UNITED STATES DISTRICT JUDGE

Filed Nov 3, 1989

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
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MEMORANDUM OPINION

For longer than anyone can reliably remember, perhaps for as long as 51 years, the Gravette, Arkansas public schools have provided an opportunity for its elementary school children to learn about the Bible. Bible classes are taught during regular school hours and in the school building, by

volunteers who are not acting on behalf of any church and re not employees of the school. No course credit is given for these classes and attendance is voluntary. Parents who do not wish their children to attend can arrange for them to spend the time given over to Bible classes int he library, in tutoring sessions, or in other, unspecified, instructional situations. Ninety-six percent of the children attend the Bible class.

The parents of one of the affected chldren filed this sulit under 28 U.S.C. sec. 1983, asserting that the practice described above violates the Establishment and Free Exercise Clauses of the First Amendment of the Constitution of the United States, and in their complaint plaintiffs moved for a preliminary injunction. A hearing was held and a week later, this court filed an order granting the

preliminary injunctin. A few days later, plaintiffs filed the instant motion for partial summary judgment as to their Establishment Clause claim. Plaintiffs assert that the case of McCollum v. Board of Education, 333 U.S. 203 (1948), is directly on point, and that under the holding of Lemon v. Kurtzman, 403 U.S. 602 (1971), defendants' practices are unconstitutional. Defendants, on the other hand, argue that McCollum is distinguishable from this case, that defendants' practices are constitutional under Lemon, that the "equal access" doctrine of Widmar v. Vincent, 454 U.S. 263 (1981), allowes privately conducted Bible study programs, that other factual disputes preclude summary judgment, and that miscellaneous other issues preclude summary judgment. For the reasons stated below, plaintiffs' motion will be granted.

I.

In McCollum v. Board of Education, supra, a school system created a program in which Protestant, Catholic, and Jewish instructors came into public schools and held classes during school hours. Although the program was purely voluntary, the Court held that the program unconstitutionally aided religion, because "[p]upils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend religious classes." Id. at 210.

Defendants in McCollum, like defendants in this case, argued that "historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." Id. at 211. The Court explicitly rejected this argument, id.

reiterating its earlier holding that governments may not "pass laws which aid one religion, aid all religions, or prefer one religion over another." Id. at 210, quoting Everson v. Board of Education, 330 U.S. 1, 15 (1947).

Defendants argue that McCollum is distinguishable from this case for numerous reasons. They assert first that in McCollum "the religious instruction was provided by specific religious bodies, whereas in Gravette the Bible instruction is nondenominational." In fact, the Gravette Bible study classes are clearly Christian, and therefore sectarian in nature. See County of Allegheny v. American Civil Liberties Union, 57 U.S.L.W. 5045, 5053 (U.S. July 3, 1989) (although "[t]he history of this nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed

Christianity specifically ... this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause").

Second, defendants argue that McCollum is distinguishable from this case because the religious instruction is provided by lay people rather than "official representatives of specific denominations...." The court fails to see the relevance of this fact. If defendants have established Christianity as a state religion, it is irrelevant whether they have done so through officials of a church or through Christian lay people unconnected with any denomination. A related argument is that in the Gravette program, unlike that invalidated in McCollum, no group sponsors the instruction. The court is of the view that the absence of sponsorship is

not a particularly important factor, and would not validate an otherwise unconstitutional program.

Defendants also note that "[i]n McCollum the religious leaders conducting the instruction took attendance and reported absences to the school officials; in Gravette they do not." This argument relates primarily to the voluntariness of the Bible instruction program, a factor the McCollum court explicitly refused to consider. McCollum, 333 U.S. at 207 n.1 (Court finds it unnecessary to consider claim that due to peer pressure, program "voluntary in name only"). To the extent that this factor relates to the question of church/state entanglement, the court holds that it was not important to the decision in McCollum.

Defendants point out, additionally, that in McCollum the students who did not

participate in religious studies had to leave the room, while in Gravette the participants leave the room. This fact is relevant primarily to the voluntariness of defendants' program, a question which was irrelevant to the holding in McCollum.

Finally, defendants argue that a genuine issue of material fact exists as to whether the Bible study program is "primarily religious in character ..."(DB 4) and that the "question of the meaning of religion and faith ... needs amore complete hearing."(DB 13) By contrast, in McCollum defendants made no pretense that their classes were secular in nature. In its initial opinion, the court held that "it would be difficult, indeed impossible, not to categorize the instructional program undertaken here as a religious one." (MO 4). On the other hand, it is clear that a valid secular purpose exists for teaching

the Bible. The court will discuss this question in greater detail below, in its discussion of Lemon.

In sum, the court finds that McCollum is on point. The court will therefore grant summary judgment unless it finds below that McCollum has been modified by Lemon or Widmar,(1) or that a genuine isue of material fact exists as to whether defendants' program is primarily religious in nature.

II.

Under Lemon, any government

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(1)The court notes in passing that McCollum is still good law. In the Supreme Court's most reent Establishment Clause opinion, it cited McCollum for the proposition that a state may not "allow public-school students to receive religious instruction on public-school premises." County of Allegheny, 57 U.S.L.W. at 5049 n. 40 (dictum). It follows from this that any program unconstitutional under McCollum probably violates Lemon as well and that defendants' program is unconstitutional if it constitutes "religious instruction."

involvement with religion, to be constitutional, must have a secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion. Lemon, 403 U.S. at 612-13. The Court has made it explicit that "[s]tate action violates the Establishment Clause if it fails to satisfy any of these" requirements. Edwards v. Aguillard, 482 U.S. 578, 583 (1987).

A.

Although Mrs. Smith, one of the Bible teachers at Gravette schools, is clearly a devout Christian, she also "believes the Bible is of great value" in helping children to develop sound moral values and to understand and appreciate the culture in which we live, since that culture has been largely shaped by the Bible." (Smith

Affid., para. 4). Under the circumstances, on the present state of the record, the court finds that there is a genuine issue of material fact as to whether the primary purpose of Gravette's program is religious or secular.

B.

Even if defendants' program has a primarily secular purpose,it is still unconstitutional if the principal effect of the course is either to advance or inhibit religion. The Gravette Bible classes are plainly not wholly secular in characer. Nevertheless, defendants argue that even if the Bible study program has religious elements, its primary effects are the secular ones of "building character, forming moral values, and developing a truly educated person."

Even on the relatively undeveloped state of the record before the court, it is

quite clear that the course in question is predominantly religious and devotional in nature. Many of the songs taught in the course are religious, although some contain moral messages as well. For instance, the song "Countdown" discusses Jesus's Second Coming to Earth (plaintiffs' Exhibit 13), the song "My B-I-B-L-E" (plaintiffs' Exhibit 16), is self-explanatory, and "This Old Saint" unapologetically states Christian dogma (plailntiffs' Exh. 2). The song "L.O.V.E." speaks of Jesus's love for mankind, exemplified by his crucifixion (plaintiffs' Exh. 14). Even if nothing else was taught, these songs alone would render defendants' program constitutionally infirm. But there is more. In classroom discussion, Barbara Stapleton, one of the teachers, emphasized that "Jesus is our gateway to Heaven. He is our shepherd and he wants us all to be one big flock of

sheep." (Plaintiffs' Exh. 16). These teachings would seem to have no secular effect whatsoever. The other major "non-song" exhibit, "The Bible In Felt" is quite religious in nature, as it depicts Biblical events without elaboration. (Plaintiffs' Exhibit 1). In sum, the evidence in the record shows quite clearly that many of the songs and parables taught in the class endorse Christianity, and have very little, if any, secular effect.

It may be that other lessons have more secular content than those discussed above. For instances, the song "Work on Your Attitudes" (Plaintiffs' Exh. 15) is predominantly secular, and Gayla Hendren testified at the injunction hearing that she derived moral and historical benefits from the classes (DRB 10). Even if a substantial portion of defendants' program was predominantly secular, the court would

find that the program as a whole was unconstitutional, for the reasons stated in Abington School District v. Schempp, 374 U.S. 203, 225 (1963):

> "Further, it is no defense to urge that the religious practices here may be relatively minor encroachments upno the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent; and in the words of Madison, 'It is proper to take alarm at the first experiment of our liberties.' ..."

Defendants further argue that even if the Bible course as presently constituted is unconstitutional, certain modifications could cure its legal infirmities. This court has repeatedly said that it has no inclination whatever to issue advisory opinions or to take over the Gravette Public School District, and it therefore declines defendants' invitation to outline a constitutionally permissible form of Bible instruction. The court acknowledges that several courts have indeed formulated

alternative policies in cases like this, but declines to adopt their approach. If defendants implement alternative policies, the court may judge their constitutionality at that time if requested to do so by the plaintiffs.

C.

Because defendants' program unconstitutionally advances religion, the court need not discuss the question of excessive entanglement in great detail. In the court's view, if an evidently religious study course is taught on school grounds during regular school hours, the school is excessively entangled in it regardless of who teaches such classes. If the classes were taught after school, and if the school board allowed other activities to take place on the premises after school, then it might well violate the free exercise clause not to allow religious instruction on the

premises. More than this need not be said on this subject at this time.

III.

Defendants also argue that the concept of "equal access" enunciated in Widmar v. Vincent applies to this case. Under Widmar, a school may not create "a forum generally open to student groups ... [but] enforce a content-based exclusion of religious speech." Widmar, 454 U.S. 277. See also Mergens v. Board of Education of Westside Community Schools, 867 F.2d 1076 (8th Cir.), cert. granted, 57 U.S.L.W. 3859 (U.S. July 3, 1989) (under Equal Access Act codifying Widmar and extending doctrine to secondary schools, school which allows any "noncurriculum-related student club" must also allow religious clubs).

The court notes initially that the idea of a limited forum is much more at home in the context of colleges and

universities, where students operate as semi-autonomous citizens infrequently trammelled by persons acting in loco parentis. University classes, moreover, do not meet continuously nor is attendance for a certain number of hours a day required by law as is the case with Arkansas elementary schools. See A.C.A. sec. 6-16-102. In such an environment, it is easier to characterize the activity of a school with respect to religious exercises as mere permission and not active participation. In elementary schools, however, teachers and administrators are not charged with the duty to supervise their students constantly and to tend to their moral development. In the case of elementary schools, therefore, the notion of a limited forum is not one easily resorted to in order to save an activity from a claim of excessive entanglement. It may just be that it is

not impossible for an elementary school to establish a forum from which it would be unconstitutional to religious activities. But in this case, where no equal access policy existed before this lawsuit was filed, and where thereis no history whatever of other extracurricular activities being allowed a place in the school day, permitting the present practice to continue would involve the school board in an excessive entanglement with religion. The court recognizes the question as a close one, but, on balance, this seems the correct result, especially when the McCollum case provides a kind of bright-line test for cases of this sort.

IV.

Finally, defendants argue that genuine issues of material fact exist as to the following issues: (1) whether the Bible has a secular educational value; (2)

whether the Bible instruction program has a secular purpose, and if so, whether it has an "overriding religious purpose which nullifies the secular purpose" (DB 5); (3) the extent of the school district's "entanglement" with the Bible classes (DB 5); (4) whether the program impermissibly advances religion; (5) whether the program "creates the impression ... that the state is endorsing or sponsoring religion." (DB 5); (6) whether the program as presently structured "creates undue peer pressure to participate...." (DB 5); (7) whether the program is in fact "primarily religious in character...." (DB 4); and (8) whether, if the program is unconstitutional as presently structured, it could be made constitutional by modifications.

All but the first and sixth of these contentions have been addressed above, and both of these contentions are irrelevant to

the outcome of this case. Questions of peer pressure and voluntariness are primarily relevant to plaintiffs' Free Exercise claim rather than their Establishment Clause claim, and the educational value of the Bible is not in dispute. Accordingly, the court finds that no genuine issue exists as to any material fact.

V.

In an addendum to their brief filed on September 12, 1989, defendants raise certain arguments not raised in their original brief.

First, defendants argue that the total exclusion of the Bible from public schools would violate freedom of speech and religion, as well as the right of Gravette parents to educate their children. Indeed, it is well settled that Bible study, "when presented objectively as part of a secular program of education, may ... be effected

consistently with the First Amendment." School District of Abington Twp., Pennsylvania v. Schempp, 374 U.S. 203, 225 (1963). Entry of summary judgment in this case, however, would not require total exclusion of the Bible, but would merely enjoin a specific program. Thus, defendants' argument is beside the point.(2)

Defendants also argue that entry of an injunction in this case would violate Elsie Smith's right to freedom of speech. Mrs. Smith certainly has the right to discuss religion, but she has no right to teach a religious course during school hours on public school grounds.

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(2)Similarly, defendants argue that their classes "balance" secular humanism in public school textbooks (DRB 12). Even if defendants have established one religion (secular humanism), such conduct does not allow them to establish a second (Christianity).

Finally, defendants claim without elaboration that Zorach v. Clauson, 343 U.S. (1952) is on point. In Zorach, the Court upheld a program where students were released from public schools so they could receive religious instruction at other locations. As the religious instruction in Zorach took place off campus, that case is not on point. Defendants argue that off-campus instruction is impossible in a rural district, and that an on-campus program is therefore permissible under Zorach. The court fails to see, however, how Zorach can be both applicable and inapplicable at the same time. Furthermore, defendants' broad interpretation of Zorach would require this court to ignore McCollum, because the major difference between the two cases is that the McCollum instruction was on-campus and the Zorach instruction was off-campus.

Accordingly, the court will grant partial summary judgment and make its preliminary injunction permanent.

November 2, 1989 -s-

Date

HON. MORRIS S.ARNOLD
UNITED STATES DISTRICT JUDGE

Filed November 3, 1989

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

JOHN DOE, et al. PLAINTIFFS

v. Civil No. 89-5088

PAUL DEE HUMAN, et al. DEFENDANTS

ORDER

NOW on this 13 day of February, 1990, comes on for consideration defendant's Motion for Declaratory Judgment, filed on January 18, 1990. And plaintiffs filed a response on January 30, 1990.

On November 3, 1989, this court issued a permanent injunction barring Bible instruction in the Gravette, Arkansas, public schools. Doe v. Human, 725 F. Supp. 1503 (W.D. Ark. 1989). Defendants plan to alter the Bible classes to meet the court's objections, and seek a declaratory judgment that the revised classes are constitutional. The court will deny defendants' motion, because: (1) federal

courts generally may not entertatain suits seeking a declaratory judgment that state law is constitutional, and (2) defendants' new policy does not yet present a justiciable controversy.

I.

As a general rule, "[f]ederal courts have no jurisdiction of a declaratory judgment suit seeking a declaration that a state law is constitutional." 22A Am. Jur. 2d, Declaratory Judgment, Sec. 197 at 837 (1988). See also International Society for Krishna Consciousness v. City of Los Angeles, 611 F.Supp. 315 (C.D. Cal. 1984) (city could not sue for declaration that resolution restricting airport solicitation was constitutional); cf. Franchise Tax Board v. Construction Laborers Trust, 463 U.S. 1, 21 (1983) (no federal jurisdiction where state tax board sued both for enforcement of state tax laws and for

declaratory judgment that state laws were not preempted by ERISA).

It could be argued, however, that International Society and Franchise Tax Board are distinguishable, because the rationales supporting those decisions are not applicable to this case.

The International Society court held that if the government filed an affirmative suit to enforce the challenged ordinance, the suit would be under the ordinance itself rather than under federal law. Thus, the government lacked an indpendent federal cause of action. International Society, 611 F.Supp. at 317-18. By contrast, in this case defendants could not possibly sue plaintiffs to enforce their new Bible policy, and therefore have no cause of action under state law. It could therefore have no cause of action under state law. It could therefore be argued

that International Society is inapplicable because the only possible suit by defendants would be one under federal law. If the court adopted this view, it would be holding that local governments could sue for a declaratory judgment in federal court if, and only if, they could not sue under state law. As such an outcome is obviously absurd, the court finds that the rule of International Society should be applied to this case.

In Franchise Tax Board, the Supreme Court barred a state government's declaratory judgment action because states "are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by [a private plaintiff]...." Franchise Tax Board, 463 U.S. at 21. It could be argued that Franchise Tax Board is inapplicable to this

case, because the government risks a contempt citation by waiting for private plaintiffs to sue. Even if defendants were found in contempt of the court's November 3 order, defendants could minimize any resulting prejudice through prompt compliance with the order. The court therefore finds that Franchise Tax Board bars declaratory judgment actions by governments even where, as here, the court has already addressed the constitutionality of similar government conduct.

In sum, the court finds that the differences between this case and the cases cited above do not bar application of the general rule that state and local governmentsmay not seek a declaratory judgment from a federal court that their practices area constitutional. On this basis alone, defendants' motion should be denied.

II.

Even if this court could entertain a declaratory judgment action in this case, it could be argued that there is not yet a justiciable controversy as to defendants' new policy. The difference between an abstract question of law and a justiciable controversy is a question of degree, 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure: Civil 2d sec. 2757 at 579-80 (2nd ed. 1983), and the decisionto allow or dismiss a declaratory judgment action is discretionary. The court finds that no substantial controversy presently exists in this case, for three reasons.

First, it is not yet clear whether there is any disagreement between the parties. Plaintiffs have not yet claimed that defendants' new policy is unconstitutional, and may never do so.

Second, the court cannot yet determine whether or how defendants' new policy differs from their earlier policy. The major difference between defendants' "new" Bible classes and their "old" classes, according to defendants, is that the teachers "will refrain from expressing opinions as to the truth or falsity of the Bible ... and will refrain from using songs that teach doctrinal content...." (Motion for Declaratory Judgment, para. 4). Before this court entered summary judgment, defendants made identical claims as to their earlier policy. For instance, Elsie Smith, one of the Bible instructors, claimed that her classeswere non-denominational and that she did not express her personal opinions as to the truth or falsity of the Bible (First Smith Aff., paras. 3, 6). Thus, there is simply no way for the court to determine the

constitutionality of defendants' new policy before it is implemented.

Third, a declaratory judgment is inappropriate where "[t]he proposed decree cannot end the controversy." Public Service Commission v. Wycoff Co., 344 U.S. 237, 247 (1952). If, this court rejects defendants' new policy on the merits, defendants would probably draft another slightly different Bible instruction policy and request yet another declaratory judgment, and would repeat the process until the court finally ruled for the defendants. Thus, addressingdefendants' motion on the merits would not terminate liltigation, and would probably force this court into becoming a school board.(1) This court has repeatedly told defendants that it will not do that.

Accordingly, it is ORDERED that defendants' motion be, and it his hereby,

Feb. 13, 1990 -s-

Date HON. MORRIS S. ARNOLD
UNITED STATES DISTRICT JUDGE

Filed Feb. 14, 1990

(1)Plaintiffs also argue that this court was divested of jurisdiction to consider defendants' motion because this case is on appeal. A notice of appeal generally deprives the district court of jurisdiction over "those aspects of the case involvedinthe appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982). As defendants motion for declaratory judgment is ostensibly an entirely new cause of action, it is not affected by the notice of appeal.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2945

John Doe; Mary Doe, individually and as next friends of the minor; Chris Doe and all others similarly situated,	*	
Appellees,	*	
vs.	*	Appeal from the United States District Court for the Western District of Arkansas.
Paul Dee Human, Superintendent of Gravette Public School District; A.P. Vohs, Principal of Gravette Elementary School; Dale Bequette, President of the Gravette School Board; John Garrett; Rex Elder; Jerry Easley; Charles L. Casey; Billy V. Hall; Bill Meade, Members of the Gravette School Board and their agents, employees & successors in office; The Gravette Public School District,	*	[UNPUBLISHED]
Appellants.	*	

Submitted: October 8, 1990

Filed: October 23, 1990

Before LAY, Chief Judge, BRIGHT, Senior Circuit Judge, and TIMBERS,* Senior Circuit Judge.

PER CURIAM.

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*The HONORABLE WILLIAM H. TIMBERS, Senior Circuit Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

Thecourt having reviewed the recordsand briefs in the above entitledcase orders that the case be affirmed on the basis of the well-reasoned opinion of the district court at 725 F. Supp. 1503 (W.D. Ark. 1989).

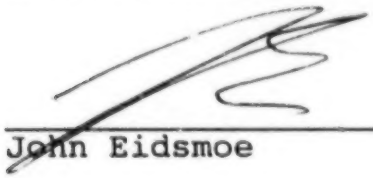
A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUT.

CERTIFICATE OF SERVICE

I, John Eidsmoe, do hereby certify that a true and correct copy of the foregoing was mailed this 22nd day of January 1991 to James Lingle and George Oleson, Attorneys at Law, P.O. Box 652, Rogers, Arkansas 72756.



John Eidsmoe

Supreme Court, U.S.
FILED
FEB 21 1991
OFFICE OF THE CLERK

No. 90-1193

In The

Supreme Court of the United States

October Term, 1990

PAUL DEE HUMAN, Superintendent of Gravette Public School District; A. P. VOHS, Principal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL MEADE, Members of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT,

Petitioners,

v.

JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GEORGE D. OLESON
JAMES G. LINGLE
P. O. Box 652
Rogers, Arkansas 72757
501-636-7899

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 90-1193

In The

Supreme Court of the United States

October Term, 1990

PAUL DEE HUMAN, Superintendent of Gravette Public School District; A. P. VOHS, Principal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL MEADE, Members of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT,

Petitioners,

v.

JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RESPONDENTS' STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The plaintiffs, respondents here, a Gravette Public Schools pupil and the pupil's parents, brought this action in the United States District court for the Western District of Arkansas on July 12, 1989, seeking declaratory and injunctive relief under 42 U.S.C. § 1983. They alleged that the defendant school district and school officials had violated their rights under the establishment of religion and free exercise of religion clauses of the First Amendment to the United States Constitution and under the Fourteenth Amendment, by sponsoring or permitting a program of Christian religious instruction in the Gravette Elementary School.

The plaintiffs' motion for preliminary injunction was heard July 31, 1989, and was decided in their favor on August 3, 1989. The court's memorandum opinion on the preliminary injunction is published at 725 F. Supp. 1499 (W.D. Ark. 1989).

The plaintiffs' motion for summary judgment was granted on November 3, 1989 (725 F. Supp. 1503 (W.D. Ark. 1989)). The plaintiffs then non-suited their claim for relief under the free exercise of religion clause and the defendants timely noted their appeal of the court's orders of August 3 and November 3, 1989.

Subsequent to the defendants filing their notice of appeal on November 30, 1989, several post-judgment motions were decided by the District Court. None of the resulting orders were appealed by either party. Included among those orders was the order denying the defendants' motion for declaratory judgment (January 18, 1990)

that has been included in the petitioners' appendix. That order was issued after closure of the appeal record, and is not before this Court.

The United States Court of Appeals for the Eighth Circuit affirmed per curiam on October 23, 1990, based on the opinion of the District Court.

B. STATEMENT OF FACTS

The Gravette Public School District has, for a number of years, sponsored or permitted a program of Christian religious instruction in the Gravette Elementary School (kindergarten through 5th grade). This instruction is provided by outside volunteers who are not paid by the district and are not certified as elementary teachers under Arkansas law. The religious instruction is provided in the classrooms of the elementary school during that portion of the day that is set aside for instructional time.

The District's involvement includes: (1) Providing public school classrooms for religious instruction; (2) Conducting or permitting the Bible classes during the instructional day; (3) Using school resources to notify parents of the availability of the Bible instruction and to determine which parents desire to have their children attend; (4) Monitoring and supervising attendance at the Bible classes to ensure that only children who have parental permission are attending; (5) Segregating those children who do not have parental permission and supervising them while the Bible classes are conducted; and (6) Arranging the instructional schedule to accommodate the presenting of Bible instruction by outside instructors.

Mr. Paul Dee Human, superintendent of the Gravette Schools, testified at the preliminary injunction hearing that the purpose of the Bible instruction was to give the students an opportunity to learn values. He also testified that the school administration did not participate in selecting the volunteers who would teach the Bible class nor did the administration supervise or approve the content of the instruction.

Ms. Elsie Smith, one of the volunteer Bible teachers, testified that her role was to present to the children what the Bible said, without adding a denominational interpretation. The Bible stories were presented as fact. For instance, the creation story from Genesis 1 was presented as fact; the story of the deliverance of the three Hebrews from the fiery furnace in Daniel 3 was presented as a factual account of a divine miracle; and the story of Jonah and the fish, Jonah 1-2, was presented as fact.

Ms. Smith testified that her choice of readings from the Scripture was intended to emphasize the basics, including divine creation of the world, the fall of man, and parables containing a moral lesson.

In addition to reading or paraphrasing the Scripture text, the Bible instruction classes included songs. Ms. Smith testified as to one of those songs, "This Old Saint". The song contains statements such as "Jesus is God's son", "Jesus died for me", and "Great in heaven is my reward". Ms. Smith testified that those statements were factual in nature and not religious, and that she taught them to her Bible class as statements of fact.

In response to the plaintiffs' motion for summary judgment, the defendants submitted affidavits of two

experts along with affidavits of Ms. Smith, Mr. Human, and the defendants' attorney. One of the experts, Dr. Paul Vitz, testified regarding a study he had performed on the religious content of commonly used public school textbooks. Dr. Vitz concluded that most textbooks in common use do not give balanced treatment to the role religion plays in American life. He stated that he had not examined the textbooks used in the Gravette schools. The other expert, Dr. W.R. Coulson, testified as to the need of children for a sense of moral absolutes in the process of forming values. Dr. Coulson did not claim to have examined the materials or methods used in the religious teaching at the Gravette schools.

Contrary to the statements in the petition at Pages 9 through 13, no other expert affidavits were included with the response to motion for summary judgment. Instead, there was an affidavit by the defendants' attorney summarizing evidence he hoped to elicit from Drs. Burron, Moore, Doty, Berman, and Carnagey. The attorney's double hearsay affidavit was incompetent as evidence, for the attorney had no personal knowledge of the matters in it. Even if the affidavit were good evidence, it did not claim that any of these experts had particular knowledge of the materials or method of instruction in the Gravette schools.

ARGUMENT: REASONS FOR DENYING THE WRIT

The program of Bible instruction in the Gravette Elementary School is strikingly similar to the program of religious instruction that was forbidden in *McCollum v.*

Board of Education, 333 U.S. 203 (1948). In both *McCollum* and *Gravette*, public school pupils who were required by state law to be in attendance at school were released from their secular studies for a period of one-half hour per week to attend classes of religious instruction that were conducted on the tax supported premises of the school district, in the regular classrooms, during the regular hours of instruction. In both cases, pupils could participate in religious instruction only with the express written permission of their parents. Dissenters were not released from their secular studies, but were required, at least in some instances, to leave the classroom and carry on their secular studies elsewhere.

As in *McCollum*, the elementary pupils in the Gravette public schools are subject to compulsory attendance laws. Ark. Code Ann. § 6-18-201 (1987). The number of hours of instruction offered each day is fixed by law, Ark. Code Ann. § 6-16-102 (1987). Teachers and administrators are responsible for supervision and discipline of pupils while they are present during the school day. Ark. Code Ann. § 6-18-505 (1987).

The petitioners attempt to distinguish *McCollum*. First, they assert that since in *McCollum* the religious studies were conducted by various identifiable denominations, the Gravette program is permissible because it is "non-denominational". Indeed, in *McCollum* the ecumenical alliance that sponsored the religious instruction offered at least three points of religious view, while in the Gravette schools only one may be heard. That point of view is distinctly Christian in nature, and is closely identifiable with the fundamentalist branch of Protestantism, with its emphasis on Biblical inerrency, literal divine

miracles, and the imminent second coming to earth of Jesus Christ. Whether the matters of religious belief that are presented in the Gravette schools as "fact" are taken from the statement of faith of any particular Christian denomination is not relevant. The role of the state and of its schools in religion is not to prefer Christianity over other forms of faith, or even to favor theism over non-belief, but rather to maintain a strict neutrality in matters of religion. *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

Second, the petitioners contrast *McCollum*, where the classes sometimes were taught by ordained ministers, with *Gravette*, where they are taught by lay persons. The distinction is hardly significant. In *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203 (1963), this Court invalidated classroom religious exercises that were led not by ministers, and not by lay members of religious groups, but by students themselves, selected at random. It was the religious character of the readings and not the affiliation of the leaders that was determinative in *Schempp*.

Third, the petitioners urge that the *McCollum* complainants had alleged that they were under subtle pressure to attend the religious exercises, while in Gravette there is no such pressure. In fact, the *McCollum* Court found it unnecessary to decide whether the religious instruction was voluntary, as claimed by the state, or subtly coercive, as claimed by the appellant. *McCollum*, 333 U.S. at 207 n.1. Later cases have held that it is not necessary to show any kind of coercion in order to make out an establishment clause violation. See *Schempp*, 374 U.S. at 223.

Writs of certiorari are regarded as "matters of grace" with this Court, *Wade v. Mayo*, 334 U.S. 672 (1948). The Court seldom exercises its discretion to review court of appeals decisions; that discretion "will only be exercised in matters of gravity and general importance", *In Re Woods*, 143 U.S. 202 (1892).

Supreme Court Rule 10 requires "special and important reasons" before the writ will be granted. All cases implicating guarantees of free expression are important but few are "special". This one is not.

The petitioners claim that this case is unique because it offers the Court an opportunity to assess the proper role of the Bible in public education. They argue that since education involves the passing on of culture from one generation to the next, and since culture is ultimately grounded upon values, and values in turn have their roots in religion, therefore the state in performing its educational function must teach the Bible as the Judeo-Christian source of values upon which our national culture is based.[1]

---

[1] This argument fails to answer the question of *which* values will be taught by the state's schools, and *which* of the various religious roots of those values will be emphasized. For instance, a course of Bible instruction, such as the one at Gravette, that teaches the fall and depravity of man, the divinity of Christ, and the divine role of Jesus Christ in the redemption of mankind, does little to explain the Judaic roots of our common culture. The Jewish concept of individual responsibility for a just society springs from entirely different religious presuppositions than does the Christian idea of the Golden Rule. The teaching in the public schools of one set of religious premises rather than another inevitably requires the state to prefer one religion over others.

The petitioners assert that "the state . . . carries the primary responsibility for promoting and passing on culture". While there may be a common national culture that binds together our pluralistic society, the respondents believe that they, as parents, have the principal responsibility of teaching values to their children; and that the state should have absolutely no role in teaching religion to their children.

The respondents believe that although the state's schools have an important role in imparting our common national culture and its underlying values, the schools should forebear to make choices among competing religious premises from which those values are derived. One of the most distinctive values that our society recognizes is the power of the individual to make choices amongst those competing religious premises. The Gravette petitioners have invited this court to reverse many decades of constitutional jurisprudence by permitting the public schools to choose the "right" premises.

The petitioners' approach to the teaching of values in the public schools is exemplified in the following passage:

> For the *people of Gravette* have chosen a unique and promising way of coping with the thorny question of whether and how to teach the Bible in public schools. Rather than ignore the Bible and deprive the children of an important educational resource as some have done, and rather than water it down through official courses in "Bible as literature" or "comparative religion" as others have done, the *people of Gravette* have chosen to separate Bible study from the regular curriculum and instead allow it to be taught by non-school persons as a non-sponsored,

non-funded, voluntary activity. (Emphasis added.) Petition for writ of certiorari, 21-22.

It may be that some of the people of Gravette want this program of religious instruction and would be content to default their power of choice to the authority of the state; however, at least three of them do not: they are the respondents in this case. Matters of religious preference ought not to be determined by majority vote of the school board; even less should that school board permit such matters of religious choice to be decided by "non-sponsored, non-funded, non-school, non-denominational" outsiders. In matters of religious belief, each person is a majority of one.

CONCLUSION

For all these reasons, the respondents urge that the petition for writ of certiorari be denied.

John Doe and Mary Doe,
Individually and as Parents and
Next Friends of the Minor,
Chris Doe

GEORGE D. OLESON
JAMES G. LINGLE
P. O. Box 652
Rogers, Arkansas 72757-0652
501-636-7899

Counsel for Respondents

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No. 90-1193

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

PAUL DEE HUMAN, Superintendent of Gravette Public School District; A.P. VOHS, Principal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL MEADE, Members of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT, Petitioners,

v.

JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Counsel of Record
John Eidsmoe
Jones School of Law
Faulkner University
5345 Atlanta Highway
Montgomery, Alabama 36193-4601
(205) 272-5820 Ext 152

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ARGUMENT

Respondents attempt to portray themselves as champions of religious liberty and parental rights. As they say on Page 10 of their Brief in Opposition,

> It may be that some of the people of Gravette want this program of religious instruction and would be content to default their power of choice to the authority of the state; however, at least three of them do not; they are the respondents in this case. Matters of religious preference ought not to be determined by majority vote of the school board; even less should the school board permit such matters of religious choice to be decided by "non-sponsored, non-funded, non-school, non-denominational" outsiders. In matters of religious belief, each person is a majority of one.

In reality, Respondents seek to stifle religious expression and foreclose parental choice. In a nutshell, their position is: We don't want the Storytime program for our child; therefore, no parent should be allowed to have the program for his or her children; therefore, we will use the power

of the Court to prevent Storytime from taking place.

Respondents "believe that they, as parents, have the principal responsibility of teaching values to their children... ." (Page 9). In fact, that is where the the responsibility lies in the Gravette Public Schools--squarely with the parents. No child is allowed to participate in Storytime unless his parent gives written permission. At the beginning of the school year, permission slips are distributed to the children to take home to the parents. If the parent does not want his child to participate in Storytime, he does nothing at all. If he does want his child to participate, he signs the slip and returns it. The fact that about ninety-six percent (96%) of the parents do sign and return permission slips, is evidence of the popularity of the program.

In the Gravette School District, "matters of religious preference" are not "determined by majority vote of the school board" (p. 10). Rather, the Gravette School Board--acting unanimously on all matters concerning Storytime--has decided to allow Storytime as a voluntary, non-sponsored, non-funded activity, recognizing that the Storytime program teaches values and cultural background that some--in fact, ninety-six percent (96%)--of the parents may wish their children to receive. Respondents would deprive these parents of that option.

Because of the demographics of the Gravette School District, bringing the children of the district together other than during school hours is unfeasible. The Gravette School District comprises several small towns separated by large rural areas. Seventy percent (70%) of the

Gravette Elementary School's 532 students ride the bus to and from school. If Storytime were held before or after school, these students who ride the bus could not participate. If the bus schedules were altered to accommodate Storytime, that would undoubtedly be viewed as an imposition upon those students who do not participate in Storytime. Accommodating those students whose parents want them to participate in Storytime by arranging the class schedule to allow released time for those who want to participate, is an accomodation of religion such as that upheld and even praised in McGowan v. Maryland, 336 U.S. 420, 6. L.Ed.2d 393, 81 S.Ct. 1101 (1961), and Zorach v. Clausen, 343 U.S. 306, 96 L.Ed. 954, 72 S.Ct. 679 (1952).

Respondents argue that the Storytime program is like that which was ruled

unconstitutional in McCollum v. Board of Education, 303 U.S. 203, 92 L.Ed. 649, 68 S.Ct. 461, in which the Supreme Court struck down a released time program. Respondents cite six factors which show state involvement and bring this case in line with McCollum:

> (1) Providing public school classrooms for religious instruction; (2) Conducting or permitting the Bible classes during the instructional day; (3) Using school resources to notify parents desire to have their children attend; (4) Monitoring and supervising attendance at the Bible classes to ensure that only children who have parental permission are attending; (5) Segregating those children who do not have parental permission and supervising them while the Bible classes are conducted; and (6) Arranging the instructional schedule to accommodate the presenting of Bible instruction by outside instructors. (p. 3)

In fact, all of these factors except (1) were present in the released time program in Zorach v. Clausen, which the Court upheld as a permissible accommodation of religion. The question

of whether the released time programs take place on campus as in McCollum, or off campus as in Zorach, is one relevant factor but not the only factor or the controlling factor in determining whether a released time program violates the establishment clause of the First Amendment.

Respondents claim that "in McCollum the ecumenical alliance that sponsored the religious instruction offered at least three points of religious view, while in the Gravette schools only one may be heard." (page 6). This is misleading. The Gravette School Board has repeatedly emphasized that if anyone wishes to conduct another program as an alternative to Storytime, the request will be handled on an equal access basis. The fact that in the fifty-two years Storytime has been in effect no one has requested an alternative, is evidence that the Storytime is broad

enough and nondenominational enough to satisfy nearly everyone. And once again, those who do not want Storytime for their children may simply not sign the permission slip and their children will not attend.

Respondents argue that

> ...a course of Bible instruction, such as the one at Gravette, that teaches the fall and depravity of man, the divinity of Christ, and the divine role of Jesus Christ in the redemption of mankind, does little to explain the Judaic roots of our common culture. The Jewish concept of individual responsibility for a just society springs from entirely different religious presuppositions than does the Christian idea of the Golden Rule. (page 8)

Petitioners do not accept Respondents' assertion that individual responsibility is inconsistent with the Golden Rule (page 8). In fact, Petitioners note that when Jesus commanded His followers that "Thou shalt love thy neighbor as thyself" (Matthew 22:39), He quoted from the Jewish law of the Old Testament (Leviticus 19:18).

One could characterize the Storytime program as narrowly Christian, only if one considers only the isolated segments of the program brought out by Respondents at the Preliminary Hearing July 31, 1989. These are only a few segments of a comprehensive curriculum that extends over a three year period. Characterizing this program as distinctively Christian also ignores the fact that two of the three years of the Storytime curriculum cover the Old Testament, and only one year covers the New Testament. While the record does not reveal whether any Jewish families reside in the Gravette School District, a Jewish parent could, if he chose, allow his child to participate in Storytime during the two years the Old Testament is covered, but not allow his child to participate during the third year while the focus is on the New Testament.

Respondents insist (p. 5) that the affidavit from Petitioners' attorney summarizing the proposed testimony of Drs. Burron, Moore, Doty, Berman, and Carnagey was incompetent as evidence. The affidavit was based upon lengthy interviews with each of these experts, both in person and by telephone; the time constraints for submitting the briefs made it impossible to mail the affidavits and have them returned in time for submission. Furthermore, Respondents failed to object to this affidavit until the case was appealed to the Eighth Circuit. If Respondents had objected at the District Court level and if the District Court felt that this objection was valid, Petitioners could, with the District Court's permission, have cured the defect by obtaining affidavits directly from the expert witnesses. By failing to object at the District Court level,

Respondents have waived their right to raise this objection.

Respondents claim that the Storytime teachers present certain Bible stories as "fact" (page 4). One of the ladies who teaches the Storytime program testified that she teaches certain items as fact, but the complex and repetitive nature of the questions leaves a genuine issue of material fact as to what that means. Does it mean she tells the children the stories are true? Does it mean she tells the children that she believes the stories are true? Or does it mean she tells the children that this is what the Bible says and leaves it at that?

For example, Genesis Chapter One says God created the universe in six days. What the Bible means by the word "day" is a question on which people may disagree. Whether the Bible is correct or incorrect

is again a question on which people may disagree. But that the Bible says the universe was created in six days is incontrovertible fact.

To determine how the teachers teach the Storytime program requires much more than repetitious and confusing questioning about a few isolated examples. It requires an examination of the entire program, and the District Court has not permitted such an examination. This is a genuine issue of material fact that has not been resolved.

Respondents also claim the Petitioners' (Defendants') motion for declaratory judgment was not appealed and is not before this Court. One basic issue raised by Petitioners, both to the Eighth Circuit and to this Court, is the overbreadth of the District Court's Order. The District Court's refusal to grant Petitioners' motion for declaratory

judgment is but one example of this overbreadth.

An injunction against a government body such as a school board should be narrowly drawn to prohibit only such conduct as is clearly objectionable. But in this case the District Court ruled that the Storytime program may not be used in the public schools during regular school hours because of a few isolated aspects of the program that could possibly be construed as an establishment of religion. The District Court refused to identify what portions of the program were and were not objectionable. The Court refused Petitioners' request that the Court issue guidelines as to what type of program would or would not be allowed. The Court refused, after Petitioners modified the program, to issue a declaratory judgment as to whether the Storytime program as

modified was or was not constitutional. Petitioners are thus in a quandary. They want to obey the Court. At the same time, they want to accommodate the desire of most of the parents and citizens of their school district to allow a program like Storytime to the extent the Court and the Constitution allow them to do so. As things stand now, Petitioners do not know what the District Court will or will not allow--and if they guess wrongly, they may face a contempt citation.

The District Court could have fashioned narrower relief. The Court could have delineated which features of the Storytime program are objectionable and ordered that these be modified or eliminated if the program is to continue on school premises. The Court could have issued guidelines so the School Board would know what would and would not be allowed.

After Petitioners modified the program, the Court could have ruled on whether the program as modified was or was not constitutional. But the Court refused to do so. The result is an overbroad order which leaves Petitioners uncertain what they may or may not allow. Unfortunately, the safest course of action may be to disallow the entire program. The result would then be that the children and parents of Gravette are denied access to a program that has benefitted the community for over half a century.

This case, then, gives this Court the opportunity to consider many important issues affecting education and religious freedom.

It gives the Court the opportunity to consider the extent to which the public schools may inculcate values, and the extent to which in doing so they may draw

upon the religious roots of those values.

It gives the Court an opportunity to consider whether the public schools may, by allowing Bible study as a non-sponsored, non-funded, voluntary activity, the public schools may allow Bible study that might not be allowed as part of the regular curriculum.

It gives the Court the opportunity to consider whether the fact that an allegedly religious activity occurs on school premises, should be the definitive factor in determining whether or not it is constitutionally permissible.

It gives the Court an opportunity to consider whether an on-campus program of Bible instruction could be effected consistent with McCollum. Petitioners have shown significant distinctions between McCollum and the Gravette Storytime program (Petition, pp. 25-27). Respondents

have attempted to belittle each of these distinctions individually. Petitioners maintain that these distinctions, considered cumulatively, make the Gravette Storytime program substantially different from McCollum.

It gives the Court an opportunity to consider whether the "Lemon" test is applicable to this type of establishment clause case. As former Chief Justice Burger noted in Lynch v. Donnelly, 79 L.Ed.2d 604, 104 S.Ct. 1355, 465 U.S. 668 at 679-80 (1984), the Lemon test is a useful tool in some cases, but "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. ...We did not, for example, consider that analysis relevant in Marsh v. Chambers, 463 U.S. 783, 77 L.Ed.2d 1019, 103 S.Ct. 3330 (1983)."

CONCLUSION

Nearly three decades have passed since this Court, in Abington Township v. Schempp, 374 U.S. 203, 83 Sup. Ct. 1560, 10 L.Ed.2d 844 (1963), prohibited the reading of the Bible as a religious exercise in the public schools. Partly because of local misinterpretations of this decision, the use of the Bible in the public schools has greatly diminished. The result has been the onset of "value-free" education and what Richard John Neuhaus eloquently describes as "the naked public square (Richard John Neuhaus, The Naked Public Square: Religion and Democracy in America (Grand Rapids, Michigan: Eerdmans, 1984).

During this time we have observed a dramatic increase in juvenile crime, juvenile promiscuity, teen pregnancy, teen suicide, drug abuse and the like, coupled

with an equally dramatic decrease in scholastic achievement. It would of course be presumptuous to say the removal of the Bible from public education is the sole cause of these subsequent developments. But it would be equally presumptuous to assume that these developments are totally unrelated.

The academic and moral education of children is incomplete without exposure to this Book that has been so central to the development of Western civilization. The Gravette Storytime program is a solution to this problem that merits more careful consideration than a mere summary judgment. Gravette wants its day in Court!

Respectfully submitted,

John Eidsmoe
Counsel of Record
Jones School of Law
5345 Atlanta Highway
Montgomery, Alabama 36193-4601
(205) 272-5820 Ext 152

CERTIFICATE OF SERVICE

I, John Eidsmoe, do hereby certify that a true and correct copy of the foregoing was mailed this 12th day of March 1991 to James Lingle and George Oleson, Attorneys at Law, P.O. Box 652, Rogers, Arkansas 72756

_____

John Eidsmoe